No. 12047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARLE C. ANTHONY, INC.,

Appellant,

vs.

KENNETH E. MORRISON and THE VOICE OF THE ORANGE EMPIRE, INC., LTD.,

Appellees.

REPLY BRIEF OF KENNETH E. MORRISON AND THE VOICE OF THE ORANGE EMPIRE, INC., LTD.

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Statement of the Case.

Appellant is appealing from a judgment of dismissal granting a motion to dismiss appellant's complaint.

Appellant's statement of the contents of the complaint is accurate and fair. Appellees believe that the controlling portions of the complaint, upon which they rely for an affirmance of the judgment, should, for reasons of clarity and the convenience of this court, be restated here. The appellant, Earle C. Anthony, Inc., will hereinafter be referred to either as "appellant" or as "KFI," and appellee, The Voice of the Orange Empire, Inc., Ltd., as "KVOE."

The material portions of the complaint allege in substance: KFI and KVOE are both radio stations broadcasting news, entertainment and similar types of programs to the general public, and are in competition with each other. [R. 4-5.]

In the year 1947, Walter Overell and Beulah Overell, his wife, met death while on their palatial yacht in Newport Harbor, Orange County, California. Subsequently Louise Overell, daughter of the couple, and her fiance, George R. Gollum, were charged with their murder in the Superior Court of the State of California, in and for the County of Orange. The trial, at which appellee Judge Morrison presided, was one of the most sensational ever to take place, and during its more than nineteen weeks of progress was widely publicized by the press and radio. [R. 5.]

Through permission of Judge Morrison, KVOE installed a private wire and placed equipment both in the courtroom and in the Judge's private chambers, making daily broadcasts of portions of the trial. [R. 6, 9.]

On October 4, 1947, the case was submitted to the jury, and KFI asked Judge Morrison's permission to broadcast the verdict on the same terms and conditions as KVOE. Permission was refused, the Judge stating he was granting exclusive permission to KVOE, and justified his refusal on his authority to control his court. [R. 6-7.]

KFI had committed no acts that would justify the Judge in believing that if admitted to the courtroom it would create a disturbance or interfere with the orderly conduct of the trial *and in this connection, requested permission to connect its microphone into KVOE's private wire outside of the courtroom, which permission was refused.* [R. 7-8; App. Op. Br. p. 3.]

Judge Morrison gave radio station KMPC permission to locate its equipment in his chambers which adjoined the courtroom, and to connect with the KVOE leased wire, enabling KMPC to relay the KVOE broadcasts to its listening audience. [R. 9.]

ARGUMENT.

I.

The Complaint Fails to State a Cause of Action.

A. KFI Had No Civil Right to Broadcast From the Courtroom.

It is the contention of appellees that there is no civil right to broadcast from a courtroom, but it is rather a privilege that may be extended or refused by the Judge. Further, that only rights or privileges protected by the Federal Constitution can be made a basis of an action under the Civil Rights Statutes. We are not here concerned with the question of whether or not the right to collect news is a property right, but whether or not there is a civil right which is protected by the Constitution of the United States to enter a courtroom with broadcasting equipment.

Section 177 of the California Code of Civil Procedure provides in part that a judicial officer has power "1. To preserve and enforce order in his immediate presence. . . ."

The distinction between a privilege and a right is recognized in the case of *Mitchell v. Greenough,* 100 F. 2d 184. In this case plaintiff, a lawyer, was convicted in the State Courts of Washington of a crime. He was paroled on condition that he acquiesce in an order of disbarment in the State Courts of Washington. Thereafter an order of disbarment followed in the United States District Court for the Eastern District of Washington. Plaintiff alleges that the prosecuting attorney, the witnesses and the Superior Court Judge before whom he was tried conspired to have him disbarred by convicting him on testimony they knew to be perjured. As in the case here at issue,

relief was sought in the United States Courts under the provisions of Federal Statutes, 8 U. S. C. A., Sections 43, 47. A quotation from *Mitchell v. Greenough* will illustrate the point we here desire to make:

> "We pause here to observe that the right to practice law in the state court has been held by the Supreme Court not to be a privilege granted by the Federal Constitution or laws. Bradwell v. State of Illinois, 16 Wall. 130, 21 L. Ed. 422; *Ex parte* Lockwood, 154 U. S. 116, 14 S. Ct. 1082, 38 L. Ed. 929. In Green v. Elbert, 8 Cir., 63 Fed. 308, the Circuit Court of Appeals held that the conspiracy to deprive a lawyer of his right to practice law in the state courts was not a conspiracy to interfere with any right or privilege granted, secured or protected by the Constitution of the United States."

To the same effect is *Emmons v. Smitt,* 149 F. 2d 869 (certiorari denied).

The case of *Bunn v. City of Atlanta,* 19 S. E. 2d 533, contains the following statement:

> "The due process and equal protection clauses of the Federal and State Constitutions protect rights alone, and have no reference to mere concessions or mere privileges which may be bestowed or withheld by the State or Municipality at will. Discriminating in the granting of favors is not a denial of the equal protection of the law to those not favored."

The point made in *Bunn v. City of Atlanta* has been recognized by both the State Courts of California and the United States Courts. In *People v. Tugwell,* 32 Cal. App. 520, we find a case where the defendant was convicted of manslaughter and appealed on the ground, among

others, that he was denied a public trial. Article I, Section 12, of the California Constitution requires criminal trials to be public. A disturbance occurred and the Judge ordered the courtroom cleared, although some fifteen spectators remained. In affirming the judgment of conviction, the court held that if a reasonable proportion of the public is suffered to attend, the trial would not lose its character in the sense that it was public as distinguished from a secret or star-chamber trial. The point of the *Tugwell* case, applicable here, is that the right to enter a courtroom was not predicated upon the proposition that it is for the welfare of he who seeks to enter, but instead for the public welfare and protection of the accused.

The case of *Lamar Pub. Co. v. Hoag,* 131 Pac. 400, illustrates the principle. Here Charles Hoag was County Clerk of Powers County, Colorado. Section 2159, Statutes of Colorado, required him to publish a list of all nominations to public office by a certain date. The only newspaper in the county was owned by the Lamar Pub. Co. Hoag refused to publish and the newspaper sued. In denying relief, the Supreme Court of Colorado said:

> "The statute requiring the clerk to publish the list of nominations was clearly intended for the benefit of the public, and not for the benefit of newspapers. The benefit to the latter was only incidental. Certainly the law was not passed with the idea of benefiting publishers. So that the duty imposed was purely a public one. When the duty imposed upon an officer is one to the public only, its nonperformance must be a public and not an individual injury, and must be redressed in a public prosecution of some kind, if at all. 2 Cooley on Torts (3d Ed.) 756. Numerous instances are given by the author. For instance, the duty of a policeman is to watch the

premises of individuals and protect them against burglary and arson. If he goes to sleep in front of a house and a burglar enters it or it burns down, which would have been prevented had the policeman been awake, the owner cannot recover from the policeman; for the latter owed the former no legal duty. His duty was to the public. The author says further on: 'An individual can never be suffered to sue for any injury which technically is one to the public only; he must show a wrong which he specially suffers, and damage alone does not constitute wrong.'

"In Miller v. Ouray E. L. & P. Co., 18 Colo. App. 131, 70 Pac. 447, the minor son of the plaintiff, while confined in a jail, charged with a criminal offense, was suffocated by a fire which took place in the jail. The fire was charged to have been caused by defective electric wiring of the building. The county commissioners were made defendants with the electric light company. The plaintiff sought to hold the commissioners liable, because the statute required them to make personal examination of the jail, of its sufficiency and management, and to correct all irregularities and improprieties found therein, which it was charged they failed to do. It was held that the duty imposed by the statute was a public one, and its breach was held not to constitute a private wrong for which the injured party could recover in an individual action. Colo. P. Co. v. Murphy, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630, was a case in which Murphy, in his complaint, alleged that he was the lowest reliable and responsible bidder on a paving contract in the city of Denver, notwithstanding which the board of public works awarded the contract to the paving company, in violation of a provision of

the city charter that the contract should be awarded to the lowest reliable and responsible bidder. The court held that it was obvious that the provision of the charter was not enacted for the benefit of bidders, and that Murphy had no right of action. The court quoted from Strong v. Campbell, 11 Barb. (N. Y.) 125-138, wherein it was said: 'Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action.'

"In Talbot P. Co. v. Detroit, 109 Mich. 657, 67 N. W. 979, 63 Am. St. Rep. 604, the substance of the opinion is stated in the syllabus thus: 'Though a city charter requires contracts to be let to the lowest bidder, the lowest bidder under a contract proposed to be let by it, whose bid has been rejected, has no right of action at law against the city to recover the profits which might have been made had his bid been accepted.' It was so held because the charter provision was not passed for the benefit of the bidder, but as a protection to the public.

"So in the present case the statute was not passed in order that newspapers might make money by the publication of the list of nominations, but in order that the voters should be advised of the candidates whose names would appear upon the ticket at the election. The ruling of the district court, therefore, in sustaining the demurrer to the complaint was right, and the judgment is affirmed.

"Judgment affirmed."

As has heretofore been stated, it is the duty of a Judge to maintain order in his courtroom and limit those who may enter to a number commensurate with an orderly proceeding of the trial. With literally thousands wishing to be present when the verdict was rendered in one of the most sensational murder trials in history, the Judge must necessarily arbitrarily limit the number that may enter the courtroom of a rural County Court. Keeping this fundamental principle in mind, Judge J. F. T. O'Connor's quotation from the case of *Anderson v. Dunn,* 6 Wheat. 204, 19 U. S. 204, 5 L. Ed. 242, is apropos:

> "But there is one maxim that necessarily rides over all others, in the practical application of government; it is, that the public functionaries must be left at liberty to exercise the powers that people have entrusted to them. . . . Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers."
>
> *United States v. Chaplin,* 54 Fed. Supp. at 934.

B. KFI Had No Right to the Use of Judge Morrison's Chambers or the KVOE Private Wire.

It is fundamental that a cause of action may be pleaded both generally and specifically. (*South v. French,* 40 Cal. App. 28, 180 Pac. 357.) It is equally well established that a complaint which alleges both generally and specifically is insufficient if the specific acts alleged preclude the cause of action.

Rishel v. Pacific Mutual Life Ins. Co., 78 F. 2d 881 (C. C. A. 10th);

South v. French, supra;

Denmon v. City of Pasadena, 101 Cal. App. 769, 282 Pac. 820.

It is also an admitted principle of law conceded by appellant that a Judge not only has the power, but the duty, to limit those entering the courtroom to the number commensurate with the orderly proceeding of the trial; that, to quote appellant, the right to enter a courtroom "does not mean that 1,000 spectators can crowd into a courtroom that will seat 100. The Judge has the power to control his courtroom and has the right to limit attendance, so long as he does so on a non-discriminatory basis." (App. Op. Br. p. 19.)

Applying the above principles to the pleadings, it is apparent that the complaint filed by KFI fails to state a cause of action. KFI makes the general allegation:

> "KFI had done nothing that would justify defendant Kenneth E. Morrison to believe that if admitted to his said courtroom it would create a disturbance or do any act or acts that would interfere with the orderly conduct of the trial." [R. 8.]

The next sentence is specific; it alleges:

> *"In this connection KFI requested of said defendants, Kenneth E. Morrison and KVOE, permission to connect its microphone into the wires connecting that of KVOE which would have been done outside the courtroom, which permission was denied by defendants Kenneth E. Morrison and KVOE without right."* [R. 8.]

Later in the complaint, KFI complains that Judge Morrison "granted special and exclusive permission" to

KMPC, another radio station, "to locate its broadcasting facilities in the chambers of defendant Kenneth E. Morrison adjoining the courtroom, and to connect said facilities with those of defendant KVOE which had been set up in the courtroom." [R. 9.] In appellant's brief it states:

> "It is our position that a Judge who opens his courtroom to broadcasting may impose such restrictions on the exercise of the right thus conferred as will reasonably be calculated to insure proper courtroom decorum, but in doing so there must be no discrimination among those desiring to avail themselves of that right. For example, a Judge might condition his approval to a pooling plan such as that requested by KFI, as above set forth." (App. Op. Br. p. 18.)

The allegation by KFI that it would create no disturbance in the courtroom because it could hook onto the KVOE private wire outside the courtroom or could use the Judge's private chambers brings us just about to the meat of the situation. It is to be remembered that the Overell murder trial lasted in excess of nineteen weeks. KVOE installed its equipment at the beginning and made daily broadcasts during the entire trial. Appellant's own complaint states that it did not seek space in the courtroom until the time of the verdict, a time when more people would be expected to seek admittance to the courtroom than any other time. KFI fails to point out what possible legal right it could have to tap into the leased wire maintained by KVOE at KVOE's expense for more than nineteen weeks. KFI fails to point out what pos-

sible legal right it would have to enter Judge Morrison's private chambers. Surely it is not contended that KVOE did not have a perfect right to make arrangements with KMPC to use its facilities and not to so contract with KFI. Surely it is not contended that Judge Morrison did not have the right to invite one into his private chambers and not another. Surely if there is any property right involved in this case, it is the property right of KVOE in its own private leased wire. KFI urges this court to rule that Judge Morrison was under an obligation imposed by the Constitution of the United States to require KVOE to permit KFI to tap its wire, to use its microphone, and to use its facilities at a time designated by KFI, some nineteen weeks after installation. If there is any property right involved, it is the property right of KVOE to exclusively use its own private wire to broadcast the verdict. For nineteen long weeks KVOE had alone borne the cost of the installation and certainly had a right to exclusively use its wire at the time of the climax of public interest, and was not required to share this with an admitted competitor. If a man has worked long and hard husbanding the fruits of his labors, must he share what he has saved with another who sat idly by? It is our position that had Judge Morrison sincerely wished KFI to have the privilege of connecting outside the courtroom with the KVOE wire, he would have had no right to so order. Judge Morrison is here sued for not doing something he had no right to do.

II.

It Appears From the Complaint That There Is No Federal Question Involved.

Stripped of its surplusage, the complaint merely alleges that the defendant Kenneth E. Morrison, Judge of the Superior Court, maliciously refused to permit plaintiff to place its microphone in the court room over which he presided, and conspired with defendant The Voice of the Orange Empire, Inc., Ltd., to refuse plaintiff permission to tap The Voice of the Orange Empire, Inc., Ltd.'s private wire—and no more.

For a plaintiff to successfully invoke the jurisdiction of the United States Courts on the ground that protection of a Federal right is sought, the complaint, on its face, must appear to raise a substantial Federal question.

In *Storm Waterproofing Corporation v. L. Sonneban Sons,* 28 F. 2d 115, p. 117, the court states: "Jurisdiction must be made to appear from the pleaded facts."

In *Hull v. Bury,* 234 U. S. 712, p. 720, 34 S. C. 892, 895, 58 L. Ed. 1557, 1562, the court states:

> "The motion must be granted unless the suit was one arising under the laws of the United States, within the meaning of the first subdivision of Sec. 24 of the Code. The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result de-

pends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that the suit arises under some Federal Law."

There is no case precisely in point, but it is fundamental that it was not intended by the Civil Rights Statutes to make a Federal question of every departure by State officials from State laws.

Love v. Chandler, 124 F. 2d 785;

U. S. v. Mozley, 238 U. S. 383, 35 S. C. 904, 59 L. Ed. 1355.

In *Snowden v. Hughes,* 321 U. S. 1, Mr. Justice Frankfurter well points out this principle by stating:

"Otherwise every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court."

The principle is equally well stated by Judge Harrison in his opinion which is before this court, when he states:

"If the practice of law is not a privilege granted by the Federal Court or laws, how can it be construed that the right to broadcast from a courtroom is a privilege granted under the supreme law of the land?"

III.
Judges Are Exempt From Civil Suit.

Since the beginning of the common law it has been fundamental that Judges are exempt from civil suit. The only case that suggests the contrary is *Picking v. Penn. Railroad,* 151 F. 2d 240 (C. C. A., 3rd). This case contains dicta to the effect that the Civil Rights Act abrogates the exemption of Judges from civil suits. We maintain that the statement contained in the case is not a correct interpretation of what Congress intended, is pure dicta, and will not be followed. Even if it is a correct interpretation of the intention of Congres, it is in violation of the Constitution of the United States. The history of the common law rule that Judges are exempt from civil suit is admirably set forth in the opinion of Judge O'Connor, reported in *United States v. Chaplin,* 54 Fed. Supp. 929 (1944). Portions of the opinion follow:

> "Liability to answer to everyone who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility."
>
> "The immunity which has clothed judges for a century and a half in our Country found its genesis in the English common law simultaneously with the independence of the judiciary. The disappointed litigant cannot embarrass the judge in a civil action for damages irrespective of the justice of his decision, nor can a defendant upon whom sentence has been pronounced, recover damages against the judge for the real or supposed wrong."

"To sustain the Government's contention would be to destroy the independence of the judiciary and mark the beginning of the end of an independent and fearless judiciary."

An examination of the facts stated in the *Picking* case clearly shows that the statement abrogating the exemption of Judges was in no way necessary to the decision. We quote from the court's statement of facts:

"The complaint also asserts that the original arrest or seizure of the plaintiffs was without warrant of any kind; that the governor's warrant hereinbefore referred to was issued after the plaintiffs' arrest and imprisonment at Chambersburg; that the plaintiffs were taken unlawfully to Harrisburg by certain of the defendants; that plaintiff Mrs. Picking was robbed of $10.00 by the defendant Graham. . . ."

"In several paragraphs of the complaint it is alleged that the unlawful acts were instituted and encouraged by all of the defendants with the exception of Governor James, Mr. Dewey and the Pennsylvania Railroad Company, but that these defendants 'adopted' all the unlawful acts complained of as their own. . . ."

Clearly judicial exemption from suit is not extended to a Judge who is alleged to have participated in robbery and assault.

It has always been the law that dicta is to be disregarded and avoided; that an Appellate Court does not approve the dicta in a lower court's decision by refusing to grant a hearing.

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be connected with the case in which those expressions are used. If they

go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, where the very point is presented."

Osaka Shosen Kaisha Line v. United States, 300 U. S. 98, 81 L. Ed. 532 (1937).

". . . to make an opinion a decision there must have been an application of the judicial mind to the precise question necessary to be determined in order to fix the rights of the parties."

14 Am. Jur. 293.

Counsel for plaintiff in apparent recognition of the weakness of his "authority" attempts to side-step it by lengthy argument that the acts of Judge Morrison were ministerial and not judicial. This we believe immaterial. All acts necessary to the trial of a case are exempt from civil suit whether by Judge, jury or attorneys.

"The house should not be burned to destroy the mouse. To sustain the Government's contention would invite siimlar actions against grand and petit jurors, prosecuting attorneys and attorneys representing clients before our courts and juries, now immune."

United States v. Chaplin, 54 Fed. Supp. 929, at p. 934.

If the exemption of Judges from civil suit is essential to a free and independent judiciary, as all eminent authority since the beginning of the common law has maintained, then to destroy it would be to destroy by Act of Congress one of the basic principles of the United States Constitution. The foundation of the Constitution is the premise that the three branches of government are free and independent of each other.

IV.

Authorities Cited by Plaintiff Are Not in Point.

The case of *Hannegan v. Esquire* (1945), 327 U. S. 146, is of no help. Congress enacted a statute giving second class mail privileges to certain types of publications. Congress also has enacted a statute making obscene matter non-mailable. Congress has never given the Postmaster General power of censorship. The case merely holds that the Postmaster General was attempting to exercise the power of censorship—a power he does not have.

The case of *Danskin v. San Diego School District* (1946), 28 Cal. 2d 536, is not in point. Section 19431 *et seq.* of the Education Code of the State of California provides that school auditoriums must be open to the use of certain groups. The statute provides that a body seeking the use of this privilege must sign an affidavit that it does not have Communistic principles. A group sought the use of the auditorium, but refused to sign the affidavit. The California Supreme Court held the requirement of the affidavit to be unconstitutional. The Supreme Court of the United States has since invalidated the decision.

United States v. Classic (1941), 313 U. S. 299, 85 L. Ed. 1368, is a criminal prosecution for election fraud in the election of a United States Senator. It is not in point by any stretch of the imagination.

In *Screws v. United States* (1944), 325 U. S. 91, 89 L. Ed. 1495, it is alleged that a Sheriff and his deputies arrested a negro for petty theft, handcuffed him and then beat him to death. The suit is based upon the premise that he was entitled to due process of law before his life was taken by authorities.

The *Westminster School District v. Mendez,* 161 F. 2d 744 (C. C. A. 9th), is a case where the District refused to permit a child of Mexican descent to attend a white school in admitted violation of a California Statute.

The case of *International News v. Associated Press* (1918), 248 U. S. 215, 63 L. Ed. 211, is interesting for the reason that it holds that news, once collected, is property until a reasonable time after its release to the public. The entire theory of the case is based upon the proposition that one who has spent energy and money collecting news and has COLLECTED it, has a property right in the news, and piracy of the COLLECTED news may be enjoined. The case would seem to be authority supporting the exclusive right of KVOE to its private wire.

The case of *Ex parte Virginia* (1897), 100 U. S. 339, 25 L. Ed. 667, merely holds that a defendant is entitled to a trial by an impartial jury and is not, as a matter of constitutional right, entitled to a trial by a jury on which the colored race is represented.

The following cases cited by appellant are likewise of no value whatsoever for the reason that they merely hold there cannot be discrimination because of race or color:

Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 83 L. Ed. 208;

Westminster School District of Orange County v. Mendez, 161 F. 2d 774 (C. C. A. 9th);

Lopez v. Seccombe, 71 Fed. Supp. 769 (D. C. So. D. Calif.);

Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212 (C. C. A. 4th);

Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192, 89 L. Ed. 173.

Conclusion.

There is no decision that remotely suggests that a public officer is required to give equal rights in disclosing news. Such a holding would be disastrous to news agencies themselves, as in many cases exclusive coverage would be impossible. Giving one news service information without giving it actively to all others would be tantamount to discrimination. Appellees very earnestly contend that to permit this case to go to trial on the facts would in itself create an extremely dangerous precedent and that any official giving an interview would place himself in the position of being subject to suit. Furthermore, it is submitted that every dissatisfied litigant would have the right to ask the Federal Court to retry his law suit without regard for the Appellate Court of the State. It is respectfully submitted that the judgment of the United States District Court is correct, and should be affirmed.

Respectfully submitted,

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